

DISTRICT OF MAINE

Defendant

Docket No. 00-298-P-H

court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The following undisputed material facts are appropriately supported in the summary judgment record.

The defendant, National Distributors, Inc. (“NDI”), employed the plaintiff as a wine salesman. Defendant National Distributors, Inc.’s Statement of Undisputed Material Facts (“NDI’s SMF”) (Docket No. 10) ¶ 1; Response to Defendant’s Statement of Undisputed material Facts (“Plaintiff’s Responsive SMF”), included in Plaintiff’s Opposing Statement of Material Facts and Additional Material Facts (Docket No. 13), ¶ 1. A salesman lifts cases of various products on a daily basis. *Id.* ¶ 3. A case of soda weighs thirty-one pounds, a case of wine coolers weighs thirty-one pounds, and a case of champagne weighs forty-seven pounds. *Id.* ¶ 4. NDI sells a lot of Cook champagne with a heavy bottle every day in supermarkets; the plaintiff serviced supermarkets as part of his territory. *Id.* ¶¶ 5-6.

On or about August 17, 1998 the plaintiff suffered a heart attack and was briefly hospitalized. *Id.* ¶ 7. NDI mailed the plaintiff information regarding his rights and obligations under the Family

Medical Leave Act (“FMLA”) and notified him that his absence was covered by that law. *Id.* ¶ 8. The plaintiff continued his recuperation at home until the end of September 1998, when he returned to work. *Id.* ¶ 10. At that time he had used approximately six weeks of FMLA leave. *Id.* ¶ 11. His physician recommended that he not lift more than twenty pounds during the first month after he returned to work. *Id.* The plaintiff testified at deposition that although his supervisor and manager were assigned to help him with the job’s lifting requirements in October 1998, they only provided such assistance during the first week he was back at work and, in any event, he did not think that he needed such help. *Id.* ¶ 15.

On December 23, 1998 the plaintiff was admitted to Maine Medical Center with chest pain. *Id.* ¶ 18. He underwent bypass surgery on December 28, 1998, was discharged on January 3, 1999 and continued his recuperation at home. *Id.* ¶ 19. The plaintiff contacted his supervisors at NDI at the start of each month while he was out on medical leave to apprise them of his return to work status. Plaintiff’s Additional Material Facts (“Plaintiff’s SMF”), included in Plaintiff’s Opposing Statement of Material Facts and Additional Material Facts, ¶ 21; Defendant National Distributors, Inc.’s Reply to Plaintiff’s Statement of Additional Material Facts (“NDI’s Responsive SMF”) (Docket No. 14), ¶ 21. During February 1999 an NDI employee who is twenty years younger than the plaintiff took over the plaintiff’s sales territory. *Id.* ¶ 23. The plaintiff completed a rehabilitation program on March 17, 1999 and met with his cardiologist on March 30, 1999 to review his progress. NDI’s SMF ¶ 27; Plaintiff’s Responsive SMF ¶ 27. He called his department manager at NDI and told him that he would not be released to return to work during the month of April. *Id.* ¶ 28. On May 3, 1999 the plaintiff appeared at NDI to return to work, having called a supervisor the week before to say that he would be returning. *Id.* ¶ 43.

In April 1999 the plaintiff met with Jeff Kane, NDI's president, Plaintiff's SMF ¶ 3; NDI's Responsive SMF ¶ 3, and discussed an entirely new position that the plaintiff proposed NDI create for him, NDI's SMF ¶ 47, Plaintiff's Responsive SMF ¶ 47. The plaintiff proposed that, in this position, he would perform special projects and assist in the coverage of vacations. *Id.* ¶ 49. He also raised the idea of returning to NDI in this position at a September meeting, *id.* ¶ 52, and at a meeting in March 1999 with his manager and supervisor, *id.* ¶ 53.

In response to Kane's indication that the plaintiff would have to obtain a return-to-work note from his doctor before any related discussion could occur, the plaintiff's physician provided a note on or about May 5, 1999 stating that the plaintiff was cleared to return to work full duty. *Id.* ¶¶ 45-46. After receiving this note, Kane decided not to create the new position proposed by the plaintiff. *Id.* ¶ 54. Upon being informed of this decision, the plaintiff asked whether any other jobs were available for him at NDI. *Id.* ¶ 55. Kane replied that there were no other openings. *Id.* ¶ 56.

NDI continued the plaintiff's dental insurance until December 1999, when it notified the plaintiff of his rights under COBRA. *Id.* ¶ 58. The plaintiff was not without dental coverage until after he received this notice and elected not to continue with the insurance. *Id.* ¶ 59. The plaintiff maintained his major medical health insurance through his wife's employer at all relevant times. *Id.* ¶ 60. During his recovery from surgery and at all relevant times in 1999 the plaintiff received short term disability payments. *Id.*

The plaintiff testified that during the last two years of his employment by the defendant he was occasionally referred to as the "old man" in the wine department. *Id.* ¶ 61. He testified that his wine manager would occasionally refer to him as the "old professional." *Id.* ¶ 62. The plaintiff would sometimes say to fellow employees "x number of days until retirement." *Id.* ¶ 63.¹ Kane, who made

¹ The plaintiff denies this paragraph in the defendant's statement of material facts, but his specific denial — "Mr. Wilcock . . . states (continued on next page)"

the decision to transfer another salesman to the plaintiff's territory in February 1999 and who made the decision not to create the new position proposed by the plaintiff, never referred to the plaintiff as being old. *Id.* ¶ 64. The defendant's chief executive officer asked the plaintiff in 1998 "Are you still around?" and "Are you getting too old for this?" Plaintiff's SMF ¶¶ 6, 46; NDI's Responsive SMF ¶¶ 6, 46; Deposition of Richard D. Wilcock ("Plaintiff's Dep.") at 81-82. Kane asked the plaintiff in April 1999 if he "really wanted to do this [job] again, anymore [sic]." Plaintiff's SMF ¶ 47; NDI's Responsive SMF ¶ 47; Plaintiff's Dep. at 146.

III. Discussion

A. FMLA Claims (Count I)

The FMLA provides, in pertinent part:

[A]n eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

* * *

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. § 2612(a)(1).

[A]ny eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave

—

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

29 U.S.C. § 2614(a)(1).

(1) Exercise of rights

that his references to a certain number of days to retirement were said in jest" — is not supported by the citation to the record given.

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

29 U.S.C. § 2615(a). The complaint alleges that NDI violated the FMLA by terminating the plaintiff's employment and hiring a permanent replacement for him in February 1999 and that it unlawfully retaliated against him for asserting his rights under the FMLA. Complaint (Docket No. 1) ¶¶ 39-41.

Neither the dates on which the plaintiff's absence began or ended or his eligibility for FMLA leave are disputed. The parties do vigorously dispute the manner in which the 12-week period should be calculated. NDI contends that the period expired on or about February 3, 1999, because the FMLA leave taken by the plaintiff in 1998, less than a year before the plaintiff's second period of leave began, must be included in the calculation. Motion for Summary Judgment, etc. ("Motion") (Docket No. 9) at 3 & n.4 and 9. The plaintiff claims variously that the period expired on March 18, 1999, Complaint ¶ 37, March 26, 1999 and April 16, 1999, because a new 12-week entitlement became available January 1, 1999 and because the plaintiff was entitled to add three weeks of vacation time to the FMLA period,² Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment ("Plaintiff's Opposition") (Docket No. 12) at 8. With respect to the plaintiff's claim that NDI's actions in February 1999 constituted a violation of the FMLA, NDI argues that the differing calculations of the actual date of expiration of the period of leave authorized by the FMLA make no difference, and I agree.

² But see *Holmes v. e.spire Communications, Inc.*, 135 F.Supp.2d 657, 665-67 (D. Md. 2001) (FMLA does not entitle employee to more than 12 weeks of leave, regardless of contractual provisions regarding vacation).

Assuming *arguendo* both that NDI did in fact terminate the plaintiff's employment on February 2 or 3, 1999 and that the plaintiff was entitled to FMLA leave through April 16, 1999, it is undisputed that he did not return to work until May 3, 1999. The governing statute provides that the employee is entitled to his previous job or an equivalent position "on return from [FMLA]leave," 29 U.S.C. § 2614(a)(1), and the plaintiff could not have been returning from his FMLA leave over two weeks after that leave had expired, by his own most generous calculation. The Department of Labor's regulation interpreting this section of the FMLA makes this clear.

What are an employee's rights on returning to work from FMLA leave?

* * *

(b) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA.

29 C.F.R. § 825.214. By failing to report for work before the expiration of his FMLA leave, the plaintiff failed to demonstrate that he was able to perform all essential functions of his former position at the time that leave expired. *Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155, 161 (2d Cir. 1999) (fact that plaintiff not restored to position at end of 12-week period did not violate FMLA because undisputed that at end of that period plaintiff remained unable to perform essential functions of position); *Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 785 (6th Cir. 1998) (same); *Barry v. Wing Mem. Hosp.*, 142 F.Supp.2d 161, 165-66 (D. Mass. 2001); *Soletro v. National Fed'n of Indep. Business*, 130 F.Supp.2d 906, 912 (N.D. Ohio 2001). This is true even if the employer actually terminated the employee before the FLMA leave period expired, as the plaintiff contends here. *Cehrs*, 155 F.3d at 784-85.

The plaintiff's retaliation claim under the FMLA fails for essentially the same reason. The plaintiff identifies no incident of retaliation other than the incidents he discusses in connection with his claim that his employment was terminated in violation of the FMLA. Plaintiff's Opposition at 4-8. To

the extent that a separate analysis of the retaliation claim is necessary, the plaintiff has not offered any evidence that NDI demanded that he return to work before his FMLA leave, however calculated, expired; that he was fired after informing NDI that he would be unable to return to work in March or April 1999; or that NDI took any other action or failed to act in a way that could reasonably be interpreted to indicate that the fact that the plaintiff had taken FMLA leave was NDI's motivation. *See Keeler v. Putnam Fiduciary Trust Co.*, 238 F.3d 5, 9-10 (1st Cir. 2001) (in order to create trialworthy issue plaintiff must identify adverse employment action taken against him that was motivated at least in part by his use of protected leave). Indeed, the only evidence to support the February termination date cited by the plaintiff includes the statement by NDI that the plaintiff was terminated because his FMLA leave had expired. Plaintiff's SMF ¶ 25; NDI's Responsive SMF ¶ 25; Exh. 22 to 30(b)(6) Deposition of National Distributors, Inc. (Jeffrey D. Kane) at [2], Employee # 60. The fact that NDI may have been mistaken in its calculation of the expiration date does not, without more, allow the drawing of a reasonable inference that the plaintiff's employment was terminated because he used such leave.

In the unlikely event that the court needs to reach the framework for analysis of retaliation claims developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and made applicable by analogy to FMLA cases, *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 160 (1st Cir. 1998), I conclude that that the plaintiff has not established a *prima facie* case on this record because he has not offered evidence from which a reasonable inference could be drawn that there is a causal connection between his use of FMLA leave and NDI's termination of his employment, *id.* at 161, for the reasons stated above.

The defendant is entitled to summary judgment on Count I.

B. The ADA Claim (Count II)

Count II of the complaint alleges that NDI violated the Americans with Disabilities Act (“ADA”) by terminating his employment because of his disability and by unlawfully retaliating against him for requesting a reasonable accommodation. Complaint ¶¶ 46-47. NDI contends that the plaintiff was not disabled within the meaning of the ADA and that, in the alternative, his request for an accommodation was untimely. Motion at 10-13. The plaintiff responds that he qualifies for ADA coverage because he had a record of disability and was perceived by NDI as having a disability. Plaintiff’s Opposition at 8-13.

The ADA provides, in pertinent part:

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a). For purposes of the motion for summary judgment, NDI does not contend that it is not a covered entity. The Act defines “disability” as follows:

The term “disability” means, with respect to an individual —

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2).

In order to recover under the ADA for employment discrimination, a plaintiff must establish that

(1) he suffers from a disability as defined by the ADA . . . but that (2) he was nevertheless qualified for the job — that is, able to perform its essential functions either with or without reasonable accommodation — and, finally, that (3) [the employer] discharged him, in whole or in part, because of his protected disability. The burden of proof on all three prongs in this circuit is on the plaintiff.

Lessard v. Osram Sylvania, Inc., 175 F.3d 193, 197 (1st Cir. 1999) (citation omitted). The defendant attacks only the first prong.³

The plaintiff contends that the summary judgment record contains evidence to support a finding that he had a record of a disability, the second alternative definition under section 12102(2), because “[i]t is undisputed that [he] has a record of heart-related health problems.” Plaintiff’s Opposition at 9. He refers specifically to heart attacks in 1994 and 1998 and the bypass surgery in December 1998. *Id.* When an ADA plaintiff seeks to rely on this definition of disability, he must show that the record is *of a disability* as that term is defined in the first alternative of section 12102(2). *Santiago Clemente v. Executive Airlines*, 7 F.Supp.2d 114, 118 (D. P.R. 1998). Accordingly, at least one of the past two heart attacks upon which the plaintiff relies must be shown by the evidence to have met the definition of a disability, that is, that the impairment substantially limited one or more of the plaintiff’s major life activities. 42 U.S.C. § 12102(2)(A). The plaintiff identifies only working as a major life activity allegedly substantially impaired by these heart attacks.⁴ Plaintiff’s Opposition at 10-11. He apparently concedes that any disability caused by these heart attacks was temporary because he argues that duration of an impairment is not determinative of disability, but rather one of a number of factors to be considered in making that determination. *Id.* at 9-10. Unfortunately, the plaintiff does not go on to describe how the evidence other than of duration would allow a factfinder to determine that either of these heart attacks did in fact constitute a disability.

³ In its reply brief, NDI argues in addition that the plaintiff cannot establish the third prong of the *Lessard* test. Defendant’s Reply Brief in Support of Its Motion for Summary Judgment (“NDI Reply”) (Docket No. 15) at 5. This court will not grant summary judgment on the basis of an argument or issue raised for the first time in a reply brief. *In re One Bancorp Sec. Litig.*, 134 F.R.D. 4, 10 n.5 (D. Me. 1991).

⁴ NDI argues, in conclusory fashion, that “identifying working as a major life activity goes beyond the authority provided to the EEOC under the ADA,” NDI’s Reply at 4, but this court is bound by the First Circuit’s reliance on that definition in *Tardie v. Rehabilitation Hosp. of Rhode Island*, 168 F.3d 538, 542 (1st Cir. 1999). Nothing in *Sutton v. United Air Lines*, 527 U.S. 471 (1999), requires a different conclusion.

The only evidence in the summary judgment record concerning the 1994 heart attack is the following: “Plaintiff suffered an earlier heart attack in 1994 while employed by NDI.” Plaintiff’s SMF ¶ 10; NDI’s Responsive SMF ¶ 10. This brief statement does not begin to establish that this heart attack substantially limited the plaintiff in the major life activity of working. To draw such a conclusion would be to give plaintiff the benefit of an inference far beyond that contemplated by the case law governing summary judgment motions. With respect to the 1998 heart attack, the evidence is that the plaintiff “was out on family medical leave for approximately six weeks prior to returning to work,” *id.* ¶ 9, and the plaintiff asserts that when he returned “he was able to perform all of his responsibilities as an NDI wine salesman,” Plaintiff’s SMF ¶ 11. Giving the plaintiff the benefit of all reasonable inferences to be drawn from this sketchy evidence, he may have been substantially limited in his ability to work as a result of this heart attack for a period of six weeks. There is no evidence of the severity of the heart attack and there is no evidence that any permanent or long-term impact resulted from the heart attack, the factors to be considered in addition to duration in determining whether an individual is substantially limited in a major life activity. 29 C.F.R. § 1630.2(j)(2). The fact that an employer has approved medical leave as a result of a heart attack does not establish a history of disability. *Hilburn v. Murata Elecs. N. Am., Inc.*, 17 F.Supp.2d 1377, 1382 (N.D. Ga. 1998). The December 1998 bypass surgery, following which the plaintiff alleges that he was fired, cannot itself serve to establish a record of disability.⁵ Under these circumstances, the plaintiff has not shown that he can establish that the second alternative definition of disability under section 12102(2) is applicable to his claim.

⁵ The plaintiff also contends that NDI misclassified him as having a qualifying physical impairment, Plaintiff’s Opposition at 10, a gloss on the statutory alternative of “a record of such impairment” created by the Department of Labor in its regulations implementing the ADA (“Has a record of such impairment means has a history of, or has been misclassified as having, a . . . physical impairment that substantially limits one or more major life activities.” 29 C.F.R. § 1630.2(k)). None of the evidence upon which the plaintiff relies suggests that NDI so misclassified the plaintiff at any time prior to the December 1998 bypass surgery.

Moving on to the third alternative definition of disability, the plaintiff asserts that the evidence shows that NDI regarded him as disabled. Plaintiff's Opposition at 12-13. The plaintiff apparently contends that this determination should be made as of May 1999, when NDI claims that he was terminated, rather than as of February 1999, when the plaintiff claims he was terminated, because all but one of the events cited by the plaintiff to support his argument occurred after February 3, 1999. *Id.* at 11-12. This evidence, while thin and certainly disputed, is sufficient to allow a reasonable inference that NDI regarded the plaintiff as being substantially limited in his ability to work. *See generally Katz v. City Metal Co.*, 87 F.3d 26, 32-33 (1st Cir. 1996). NDI argues that the evidence addresses only its perception of the plaintiff's ability to perform his particular job and not a class of jobs or wide range of jobs, as required by 29 C.F.R. § 1630.2(j)(3)(i). NDI's Reply at 5. However, the evidence establishes that NDI was aware that the plaintiff had not been released by his physicians to work of any kind before May 3, 1999, and the evidence cited by the plaintiff, Plaintiff's Opposition at 11-12, can in most instances be reasonably interpreted to refer to any job, or at least any job similar to that which he had performed for NDI. Nothing further is required. The defendant is not entitled to summary judgment on Count II to the extent that it alleges termination because of a disability when that disability is defined as being regarded by the employer as disabled.

The same is not true of the allegation in Count II that NDI retaliated against the plaintiff in violation of the ADA by refusing an accommodation. The plaintiff does not respond to NDI's argument that his May 1999 request for an accommodation, specifically a different job with NDI, NDI's SMF ¶ 55,⁶ was made only after his employment had been terminated, making it impossible to conclude that he was terminated or otherwise subjected to any adverse personnel action as a result of the request. Motion at 13. Even when a party fails to respond to a motion for summary judgment, the

⁶ The plaintiff responded to this paragraph of NDI's statement of material facts with a qualification, Plaintiff's Responsive SMF ¶ 55, (continued on next page)

court must nonetheless consider the motion on its merits. *Mullen v. St. Paul Fire & Marine Ins. Co.*, 972 F.2d 446, 452 (1st Cir. 1992). Here, the plaintiff has not identified any request for accommodation other than that mentioned by NDI and it should be obvious that a request for accommodation made after any possible adverse employment action could not possibly serve to make that adverse action retaliatory. NDI is entitled to summary judgment on the ADA retaliation claim.

C. The ADEA Claim (Count III)

The complaint alleges that NDI discharged and discriminated against the plaintiff because of his age, in violation of the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 621 *et seq.* Complaint ¶¶ 50-51. The pertinent section of the ADEA provides:

It shall be unlawful for an employer —

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual’s age . . .

29 U.S.C. § 623(a). NDI contends that the plaintiff cannot establish a *prima facie* case of age discrimination and, in the alternative, that it has articulated a legitimate nondiscriminatory reason for any act alleged to be discriminatory and that the plaintiff cannot establish a bias on the part of NDI based on age. Motion at 17-19. The plaintiff responds, in cursory fashion, that the summary judgment record includes sufficient evidence to establish a *prima facie* case and the NDI cannot establish a legitimate nondiscriminatory reason for its adverse action, which is apparently the replacement of the plaintiff in February 1999 with a younger employee. Plaintiff’s Opposition at 13-14.

The plaintiff does not dispute NDI’s assertion that he lacks direct evidence of discriminatory intent, and that “the familiar three-stage, burden-shifting paradigm” therefore applies. *Shorette v. Rite*

but that qualification does not dispute the timing of the request.

Aid of Maine, Inc., 155 F.3d 8, 12 (1st Cir. 1998). That paradigm requires the plaintiff to make a *prima facie* demonstration that he

(1) was at least forty years of age, (2) met the employer's legitimate job performance expectations, (3) experienced adverse employment action, and (4) was replaced by a person with roughly equivalent job qualifications.

Id., quoting *Hildago v. Overseas Condado Ins. Agencies, Inc.*, 120 F.3d 328, 332 (1st Cir. 1997).

Once the *prima facie* case is established, the burden shifts to the employer to articulate a legitimate nondiscriminatory basis for the employment decision. *Id.* If the employer meets this "limited burden of production," the burden returns to the employee

to prove not only (1) that the reason the employer articulated for the challenged employment action was a pretext or sham, but (2) that its real reason was the employee's age.

Id. at 13. To meet his burden at the third stage of the analysis, the employee must offer evidence "of such strength and quality as to permit a reasonable finding that . . . the [termination] was *obviously or manifestly unsupported*." *Id.*, quoting *Ruiz v. Posadas de San Juan Assocs.*, 124 F.3d 243, 248 (1st Cir. 1997) (emphasis added by First Circuit).

NDI does not dispute that the plaintiff was a member of the protected age class, the first element of a *prima facie* case. Motion at 17. It argues that the plaintiff did not experience an adverse employment action, a position that is belied by the evidence in the summary judgment record and, at the very least, cannot be said to be an undisputed fact. It does not dispute that the plaintiff was replaced by a younger person and does not contend that this person did not have roughly equivalent skills. NDI's best argument with respect to the plaintiff's *prima facie* case focuses on the element concerning job performance expectations. NDI does not contend that the plaintiff's job performance prior to his bypass surgery was not acceptable, but rather that, because of that surgery, the plaintiff was unable to meet NDI's reasonable performance expectations for a person in that position at the

time the plaintiff was replaced in early February 1999. *Id.* at 18. The plaintiff does not respond to this argument, relying on the evidence of his acceptable performance before his surgery. Plaintiff's Opposition at 14. However, the relevant time to consider in dealing with this element of a plaintiff's *prima facie* case is the time of discharge. *Fortier v. Ameritech Mobile Communications, Inc.*, 161 F.3d 1106, 1113 (7th Cir. 1998). *See also Mitchell v. USBI Co.*, 186 F.3d 1352, 1354 (11th Cir. 1999) (to make *prima facie* case, plaintiff must show that he was qualified for position at time of discharge); *Woodhouse v. Magnolia Hosp.*, 92 F.3d 248, 252 (5th Cir. 1996) (same); *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1315 (4th Cir. 1993) (same). While previous employment history may in some circumstances "be relevant and probative in assessing performance at the time of termination," earlier evaluations "cannot, by themselves, demonstrate the adequacy of performance at the crucial time when the employment action is taken." *Fortier*, 161 F.3d at 1113. Here, the evidence that the plaintiff was not capable of performing his prior job at the time it was filled by a younger employee is undisputed. The plaintiff does not suggest that his ADEA claim encompasses any other action by NDI. Accordingly, the plaintiff cannot meet his *prima facie* burden. NDI is entitled to summary judgment on Count III.

D. The State-Law Claims (Count IV)

Count IV asserts claims under the Maine Human Rights Act ("MHRA"), 5 M.R.S.A. § 4572 *et seq.* Complaint ¶¶ 53-54. NDI contends that it is entitled to summary judgment on these claims because they are governed by the same legal standards as are the plaintiff's ADA and ADEA claims under federal law. Motion at 10 n.11, 17 n.14. The plaintiff does not respond directly to this argument, but his assertion that "[b]ecause the record supports a reasonable finding that Mr. Wilcock was the victim of discrimination under the ADEA and the ADA, his claim under the Maine Human Rights Act must succeed," Plaintiff's Opposition at 19, suggests that he agrees. In any event, NDI is

correct. *Winston v. Maine Tech. College Sys.*, 631 A.2d 70, 74-75 (Me. 1993) (ADA); *Maine Human Rights Comm’n v. Department of Corrections*, 474 A.2d 860, 865-68 (Me. 1984) (age discrimination). *See also Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 14 (1st Cir. 1997). Accordingly, NDI is entitled to summary judgment on Count IV only to the extent that it raises claims of age discrimination and claims of disability discrimination other than the claim that the plaintiff was discharged because NDI regarded him as being disabled.

E. The ERISA Claim (Count V)

Count V of the complaint alleges that NDI violated the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1001 *et seq.*, by failing to provide notice either in February or May 1999 of the availability of continued benefits coverage as required by that statute. Complaint ¶¶ 58-59. The relevant statutory language provides:

The plan sponsor of each group health plan shall provide . . . that each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event is entitled, under the plan, to elect, within the election period, continuation coverage under the plan.

29 U.S.C. § 1161(a). *See also* 29 U.S.C. § 1166(a)(4)(A).

Any administrator . . . who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary . . . within 30 days after such request may in the court’s discretion be personally liable to such participant or beneficiary in the amount of up to \$100 a day from the date of such failure or refusal . . .

29 U.S.C. § 1132(c)(1). NDI contends that it was only required to provide notice to the plaintiff when it decided to stop paying for his dental benefits, apparently the only benefit covered by ERISA that the plaintiff was receiving, in December 1999, and that it did so at that time. Motion at 14-15. Even if that were not the case, it argues, any violation of the notice requirement caused no damage to the plaintiff. *Id.* at 15. Finally, NDI asserts that the plaintiff may not contend that it failed to provide him

with information other than the required notice because such a claim is not set forth in the complaint. NDI's Reply at 7.

NDI's final contention is incorrect. The complaint may be read, with the benefit of a reasonable inference, to allege that NDI failed to provide information that it was required by ERISA to provide other than notice. Complaint ¶ 58. Therefore, I will consider the plaintiff's claims concerning notice and other information. The plaintiff limits his claim concerning the information other than notice to a "failure to response [sic] to Plaintiff's inquiry in writing." Plaintiff's Opposition at 18.

The plaintiff correctly asserts, *id.* at 15, that termination of employment is a "qualifying event" within the meaning of section 1161(a), *Mansfield v. Chicago Park Dist. Group Plan*, 997 F. Supp. 1053, 1056 (N.D. Ill. 1998). However, the statutory inquiry does not end there. The notice requirement is only triggered if the qualifying event would cause the participant to lose coverage. Here, the fact that the plaintiff's dental insurance coverage continued after termination of his employment is undisputed. The plaintiff has submitted no evidence to suggest that he was required to take any action in order to continue that coverage at that time.⁷ Accordingly, no qualifying event occurred and no notice requirement arose. *Id.* at 1057; *see also Fenner v. Favorite Brand Int'l, Inc.*, 25 F.Supp.2d 870, 873 (N.D. Ill. 1998). Even if that were not the case, the plaintiff has not shown that he was damaged in any way by NDI's failure to provide the required notice either in February or May, and NDI is entitled to summary judgment on this claim for that reason as well. *Boucher v. Williams*, 13 F.Supp.2d 84, 105 (D. Me. 1998).

⁷ The plaintiff contends that he "would have to proactively elect to continue his coverage," Plaintiff's Opposition at 16, citing the NDI benefit plan, Plaintiff's SMF ¶ 63, but the undisputed fact is that his dental coverage did in fact continue after his termination without any action by the plaintiff, whether that event occurred in February or May 1999, and that fact, not the terms of a policy that were not in fact invoked by NDI, governs here. Counsel for the plaintiff is reminded that citation to a multi-page document without a pinpoint citation to the page upon which appears the term in that document on which he relies is unacceptable practice in this court. *See Loc. (continued on next page)*

With respect to the claim that NDI failed to respond in writing to the plaintiff's "questions regarding his dental insurance," Plaintiff's Opposition at 15, the court is hampered by the plaintiff's failure to identify the statutory authority requiring such a response which is a basic prerequisite for the application of section 1132(c)(1). The only factual assertion offered by the plaintiff on this point is that he "continuously inquired as to his status regarding his dental insurance." Plaintiff's SMF ¶ 67. NDI's statement of material facts elaborates on this assertion only to the extent the plaintiff made such inquiries in June, July and August of 1999. NDI's SMF ¶ 59; Plaintiff's Responsive SMF ¶ 59. I doubt that this minimal information is sufficient to allow the plaintiff to make a claim under section 1132(c) at all. *See Straughn v. Delta Air Lines, Inc.*, 250 F.3d 23, 33 (1st Cir. 2001) ("even in employment discrimination cases" summary judgment compelled if non-moving party "rests merely upon conclusory allegations, improbable inferences, and unsupported speculation"). In any event, the "status" of an employee's dental insurance is not within the scope of information required by 29 U.S.C. § 1024 to be provided to ERISA plan beneficiaries by plan administrators, and I have found no other section of subchapter I of chapter 18 of Title 29, the subchapter in which section 1132 appears, which would apparently require an administrator to provide such information. *See* 29 U.S.C. §§ 1021, 1025, 1166.

For the foregoing reasons, NDI is entitled to summary judgment on Count V of the complaint.

E. Punitive Damages (Count VI)

Count VI of the complaint seeks punitive damages on all claims. If the court agrees with my recommendations, all that remains for trial in this action is the plaintiff's ADA and state-law claim of discrimination in that his termination was based on a disability defined as NDI's regarding the

R. 56(e).

plaintiff as having a disability.⁸ NDI contends that the plaintiff cannot present evidence that it acted with malice or reckless indifference to his rights under the ADA. Motion at 19. This is the applicable standard for punitive damage awards under the ADA. *Kolstad v. American Dental Ass’n*, 527 U.S. 526, 534 (1999). The plaintiff in response wisely does not attempt to argue that the evidence in the summary judgment record would allow a finding that NDI acted with malice but does contend that it acted with reckless indifference to his federally protected rights. Plaintiff’s Opposition at 19. However, as a basis for this conclusion the plaintiff offers only the statement that NDI’s actions were “both intentional and purposeful.” *Id.* Something more is necessary in order to establish reckless disregard of a plaintiff’s rights under the ADA. Some showing that NDI was aware or should have been aware of the requirements of the ADA would seem to be required. *See id.* at 535 (terms “malice” and “reckless indifference” pertain to employer’s knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination).

Here, the plaintiff has presented no evidence concerning NDI’s familiarity with the ADA or that would otherwise allow the drawing of a reasonable inference of its awareness that it might be acting in violation of the ADA in its dealings with him after December 1998.

A plaintiff may satisfy this element by demonstrating that the relevant individuals knew of or were familiar with the antidiscrimination laws and the employer’s policies for implementing those laws. A plaintiff may also establish that the defendant acted with reckless disregard for his federally protected rights by showing that the defendant’s employees lied . . . in order to cover up their discriminatory actions.

Bruso v. United Airlines, Inc., 239 F.3d 848, 858 (7th Cir. 2001) (*see also* cases cited at n.6). *See also Foster v. Time Warner Entertainment Co.*, 250 F.3d 1189, 1196-97 (8th Cir. 2001) (decisionmakers knew that plaintiff was covered by ADA and that employer’s manual listed reasonable ADA accommodations and plaintiff’s supervisor reminded decisionmakers numerous times

⁸ I have recommended that NDI be granted summary judgment on the ADA retaliation claim.

that plaintiff was covered by ADA and should receive accommodation; decisionmakers told supervisor that they didn't care about company policy, did not have to follow ADA and that situation was none of supervisor's business; evidence held sufficient to support award of punitive damages). Here, the plaintiff has made no such showing. Accordingly, NDI is entitled to summary judgment on Count VI.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **GRANTED** as to Counts I, III, V and VI and as to all claims raised in Counts II and IV other than those based on a claim that the plaintiff's employment was terminated because the defendant employer regarded him as being disabled.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 2nd day of August, 2001.

David M. Cohen
United States Magistrate Judge

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